IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 31 of 2007.

Judgement reserved on: 2.11.2007.

Date of decision: 13.12.2007.

Manjeet Singh ….. **Appellant.**

Vs.

State of H.P. …. **Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Ms. Shilpa Sood, Advocate.

For the Respondent : Mr. M.L. Chauhan, Additional Advocate General.

Kuldip Singh, Judge.

This appeal has been filed against the judgement of conviction and sentence, dated 6.12.2006, passed by learned Special Judge, Fast Track Court, Chamba, in Sessions Trial No. 67/04/04, convicting the appellant-accused, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the Act) and sentencing him to undergo rigorous imprisonment for 5½ years and fine of Rs.55000/-, in default of payment of fine, further rigorous imprisonment for one year.

2. The prosecution case in brief is that on 2.2.2004 at 11.30 p.m., police party comprising of ASI Abhey Singh, HC Dev Raj,

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Whether the reporters of the local papers may be allowed to see the Judgment?

Constables Pawan Kumar, Ram Dayal and Sunil Kumar was on Nakka duty at Ballu Pul Chowk, Chamba due to frequent thefts in that area. Raj Kumar and Joginder Singh were returning to their shops after taking dinner, ASI Abhey Singh was talking with Raj Kumar and Joginder Singh. In the meantime, a person carrying polythene envelop/packet in his right hand came from Ballu Pul side. On noticing police party, said person became nervous, turned back and started running. On suspicion, police officials chased and over powered him. The man disclosed his name Manjeet Singh. The polythene packet was opened and checked. A cream coloured shirt in which another envelop was wrapped was found in it. This packet/ envelop was also opened and checked and from it charas in the shape of sticks was recovered. ASI Abhey Singh deputed constable Ram Dayal to arrange weights and scale. On weighment, the recovered stuff was found to be 550 grams of charas. Out of the recovered stuff, two samples of 25 grams each were separated. The samples were put into two empty cases, which were wrapped and sealed by seal impression-A. The remaining bulk charas weighing 500 grams was put in a parcel and was also sealed with seal impression-A. The specimen seal impression of the seal used was retained on a piece of cloth Ex.PE and seal after its use was handed over to Joginder Singh. The charas recovered from appellant was taken into possession vide memo Ex. PB in the presence of witnesses. NCB forms were filled on the spot by ASI Abhey Singh in triplicate. A rukka Ex. PA was sent by ASI Abhey Singh through constable Pawan Kumar to the S.H.O., Chamba and on the basis of

rukka, FIR No. 28/04 Ex. PW 11/A was registered. A copy Ex. PW 10/A of rukka was dispatched by ASI Abhey Singh through constable Sunil Kumar to the office of Superintendent of Police, Chamba, for information.

3. On registration of FIR, constable Pawan Kumar returned to the spot alongwith the case file. The accused, parcels of charas and documents relating to the case were handed over by ASI Abhey Singh to HC Dev Raj. The accused was arrested, statements of witnesses were recorded.

4. HC Dev Raj on his return to Police Station produced the case property and the accused before Inspector Khub Ram, the then SHO, Police Station, Sadar Chamba. The parcels of charas were resealed by Inspector Khub Ram, which were deposited with MHC. One part of the sample alongwith relevant documents was sent by the police to the Composite Testing Laboratory (CTL), Kandaghat for analysis. The report of the Chemical Examiner was obtained. After completion of investigation, challan was put up in the court and the appellant was charged, under Section 20 of the Act. The prosecution examined 17 witnesses. The statement of the appellant was recorded, under Section 313, Cr.P.C. He denied his implication in the case. In defence, he examined one witness. The learned Special Judge, Fast Track Court convicted and sentenced the appellant as noticed above, hence this appeal.

5. I have heard Ms. Shilpa Sood, learned counsel for the appellant- accused and Mr. M.L.Chauhan, learned Additional Advocate General, for the State- respondent and also gone through

the record. The learned counsel for the accused has submitted that the learned Special Judge has misconstrued, misinterpreted the material on record. She has submitted that there is non-compliance of Section 50 of the Act. The recovery of alleged contraband has not been proved. There are material contradictions in the prosecution story. She has pleaded for acquittal of the appellant. The learned Additional Advocate General has supported the impugned judgement.

6. PW 1 Constable Pawan Singh has stated that on 2.2.2004 he, HC Dev Raj, constables Sunil Kumar, Ram Dayal and ASI Abhey Singh Minhas were present at Pathankot road near Ballu Pul at 11.30 night on patrolling and nakka duty. Accused came from Tissa road power house side, he tried to escape on noticing them, but he was overpowered. The accused was carrying plastic envelop in his right hand. ASI Abhey Singh conducted the search of the accused and on search one shirt was found kept inside the plastic envelop. One more plastic envelop was found wrapped with the shirt. On opening the envelop, it was found to contain charas in the shape of sticks. Constable Ram Dayal brought the weights and scale from nearby shop. On weighment, the recovered stuff was found to be 550 grams charas. Out of the recovered stuff, two samples of 25 grams each were drawn separately and were sealed in a separate parcel with seal impression-A. The remaining 500 grams charas was also sealed separately with seal impression-A. The Authorised Officer prepared rukka Ex. PA, which was handed over to him. He handed over the rukka to Khub Ram SHO at about 1.30 night for registration

of the case. Thereafter the case file was prepared by MHC, Police Station, Chamba, which was handed over to him and he brought back that and handed over the same to ASI Abhey Singh. In cross examination, he has stated that entire proceedings of the case were conducted in his presence. He came from the spot with rukka at 1.10 night. At the time of conducting the search of accused, ASI Abhey Singh gave his search to the accused. ASI Abhey Singh asked the accused whether he wanted to be searched by him or in the presence of Magistrate or gazetted officer, but the accused told that he was ready to be searched by ASI Abhey Singh.

7. PW 2 Sunil Singh has supported PW 1 Constable Pawan Singh regarding recovery of 550 grams of charas from the accused. He has also stated that copy of rukka was handed over to him, which was brought by him and handed over to ASI Sarup Kumar Reader to Superintendent of Police in his quarter. PW 3 Constable Ram Dayal has stated that charas was recovered from Manjeet Singh. ASI Abhey Singh deputed him to bring the weights and scale, which he brought from Kuldip Singh a vegetable seller. On weighment, charas was found to be 550 grams. In cross examination, he has stated that independent witnesses were already present on the spot. PW 4 Joginder Singh did not support the prosecution and he was declared hostile. In the cross examination conducted by the prosecution, he has admitted his signatures on seizure memo Ex.PB. He admitted his signatures on big size parcel and small parcel Ex. PD. He has also admitted his signatures on specimen seal impression contained on a piece of cloth Ex. PE. He

admitted his signatures on arrest memo Ex. PG as well as on search memo Ex.PH. He has not explained how he signed various documents. PW 5 Raj Kumar has also not supported the prosecution and was declared hostile. He was cross examined by the prosecution. In his cross examination, he has admitted his signatures on memo Ex.PB and parcel Ex. PC and small parcel Ex. PD. He also admitted his signatures on arrest memo Ex. PG, search memo Ex.PH. He has not explained how he signed various documents, on which he admitted his signatures. PW 6 Latif Mohammad has stated that on 3.2.2004, the case property of this case i.e. three parcels containing parcel of charas, remaining charas were resealed by Inspector Khub Ram with reseal impression-K and reseal memo Ex.PW 6/A was prepared, which was signed by him. PW 7 Constable Rakesh Kumar has stated that on 4.2.2004 MHC Rajinder Singh, Police Station Sadar, Chamba gave him one sealed parcel containing sample of charas sealed with seal-A and reseal impression-K alongwith RC No. 18/04 and NCB form and seal envelop to be deposited at CTL, Kandaghat, which he deposited at CTL, Kandaghat against proper receipt on 5.2.2004. The RC was again returned to MHC, Police Station, Chamba. The case property so long it remained in his possession, its seals remained intact.

8. PW 8 Constable Shiv Kumar has stated that on 4.2.2004 SHO Khub Ram prepared special report and handed over the same to the Reader to Superintendent of Police, Chamba ASI Sarup Singh against proper receipt on the same date at 1.30 p.m. PW 9 Constable Desh Raj has stated that on 3.2.2004, he received WT

message from SHO, Police Station, Chamba regarding arrest of accused, which information he transmitted through wireless to SHO Division Ludhiana, a copy of message to this effect is Ex. PW 9/A. PW 10 ASI Sarup Kumar has stated that copy of rukka Ex. PW 10/A was received by him through constable Sunil Kumar, which was placed by him before Superintendent of Police, Chamba, who put his initial at point-A. On 4.2.2004, special report Ex. PW 10/B was also received by him through constable Shiv Kumar, which was placed before Superintendent of Police, Chamba, who put his signatures at point-B.

9. PW 11 Rajiinder Singh has stated that on 3.2.2004, Inspector SHO Khub Ram had deposited three sealed parcels, two small and one big containing samples of charas and remaining bulk charas sealed with seal impression-A and reseal impression-K alongwith NCB form and sample seal contained on a piece of cloth. This case property was duly entered by him in Malkhana Register No.19 on the same day. On 4.2.2004, one sealed parcel containing samples of charas alongwith NCB form was sent by him through RC No.18/04 to C.T.L.,Kandaghat for chemical test through constable Rakesh Kumar No. 258. So long the case property remained with him, the seals remained intact. Ex.PA was received at Police Station, Chamba on which FIR Ex. PW 11/A was registered.

10. PW 13 HC Hans Raj has stated that he partly conducted the investigation and recorded the statements of constables Rakesh Kumar, Shiv Kumar, ASI Sarup Kumar, MHC Rajinder Singh and constable Desh Raj, wireless operator according to their version. PW

14 ASI Abhey Singh has supported PW 1 and PW 2 regarding recovery of 550 grams of charas from accused. He has proved charas contained in parcel which is Ex. P-1 and polythene envelop Ex. P-2, NCB form Ex. PW 14/A, rukka Ex. PA, inventory Ex. PW 14/B. He handed over the accused alongwith case property to HC Dev Raj and other documents as per inventory for further investigation. PW 15 HC Dev Raj has stated that he alongwith ASI Abhey Singh Minhas, constables Ram Dayal, Pawan Kumar, Sunil Kumar was on nakka duty near Ballu Pul. He has stated that 550 grams charas was recovered from the accused. He has supported other prosecution witnesses for recovery of charas from accused. ASI Abhey Singh entrusted the case to him for further investigation vide inventory Ex. PW 14/B alongwith case property and the accused. He prepared site plan Ex. PW 15/A. He recorded the statements Ex. PF and Ex. PJ of the witnesses Raj Kumar and Joginder Kumar as per their version. He also recorded the statement Ex. PW 15/B of Kuldeep Singh. He also disclosed the grounds of arrest to accused and prepared arrest memo Ex. PG. He conducted the search of accused and prepared memo Ex. PH. Thereafter he came to the Police Station alongwith police party and the accused was handed over to Inspector Khub Singh alongwith case property. In cross examination, he has stated that he did not serve notice under Section 50 of the Act to the accused. Volunteered, it was a case of chance recovery. He did not offer himself for search by the accused as he did not conduct the search.

11. PW 16 Inspector Khub Ram has stated that on 3.2.2004, he received rukka Ex. PA from ASI Abhey Singh through constable Pawan Kumar, on which he made endorsement Ex. PW 16/A under his signatures and thereafter an FIR Ex. PW 11/A was registered. On the same day, HC Dev Raj deposited with him three sealed parcels sealed with seal impression-A alongwith specimen seal, NCB form and accused was also produced before him. He resealed all the three sealed parcels with seal-K by affixing two seal impressions on each parcel and reseal memo Ex. PW 6/A was prepared by him. Thereafter he handed over the case property to HC Rajinder Singh MHC alongwith NCB form etc. On 4.2.2004, he sent special report through constable Shiv Kumar to Superintendent of Police, Chamba, for information, which is Ex. PW 10/B.

12. PW 17 Kuldeep Kumar has stated that about two years ago, police constable came to his shop in his absence and took weights and scale from his shop. He was declared hostile and was cross examined by the prosecution.

13. Ms. Shilpa Sood, learned counsel for the appellant has submitted that recovery in the present case has not been proved, independent witnesses PW 4 and PW 5 have not supported the prosecution and were declared hostile. Once the independent witnesses have not supported the recovery, therefore, on this ground alone the prosecution case falls. Ex. PB is the recovery memo of charas. PW 4 Joginder Singh in his cross examination has admitted his signatures on Ex. PB and parcels of charas, specimen seal impression on a piece of cloth Ex. PE,

arrest memo Ex.PG and search memo Ex. PH. PW 5 Raj Kumar was also declared hostile, but in cross examination he has admitted his signatures on recovery memo Ex. PB, parcel of charas Ex. PC and small parcel of charas Ex. PD, arrest memo of appellant Ex. PG and search memo Ex. PH. Both PW 4 and PW 5 have not explained how they have signed on so many documents. It is now settled law that the testimony of hostile witness can be relied by the court to the extent it is found reliable. In the present case in the examination in chief, PW 4 and PW 5 have not supported the prosecution, but they have virtually admitted the case of the prosecution in their cross examination. Thus PW 4 and PW 5 coupled with other prosecution witnesses have proved the recovery of contraband from the appellant, which is found to be charas vide CTL report Ex. PW 14/A. The prosecution has proved complete chain from recovery of contraband from the appellant, sealing, resealing of the samples, special report Ex. PW 10/B, FIR Ex. PW 11/A and ultimately Chemical Examiner report Ex. PW 14/A wherein contraband was found to be charas. The appellant in his statement, under Section 313 Cr.P.C. in reply to question No. 9 regarding seizure memo Ex. PB has stated “I do not know”. Thus appellant has not denied specifically in his statement recovery of contraband vide Ex. PB.

14. DW 1 Gurcharan Dass has stated that he alongwith appellant came to Dalhousie on 22.2.2002 for site seeing. Thereafter they came to Chamba and roamed in Chamba bazaar during day time. In the meantime police constables came there and took away the appellant. He asked the police officials why they were taking the

appellant. They informed him that they would tell him later on. He returned to his village Ludhiana and told this to the father of the accused. In cross examination, he has stated that he could not say whether on 2.2.2004 the appellant was arrested near Ballu bridge at 11.30 night and 550 grams charas was recovered from him. The statement of DW 1 Gurcharan Dass is of no help to appellant inasmuch he has stated that on 22.2.2002 police took the appellant from Chamba bazaar whereas the appellant was arrested on the intervening night of 2/3.2.2004. The prosecution has proved by leading cogent evidence that 550 grams charas was recovered from the appellant on the intervening night of 2/3.2.2004.

15. The learned counsel for the appellant has strenuously argued that the contraband was recovered from the person of appellant in violation of Section 50 of the Act and for this reason the appellant is entitled to acquittal. She has submitted that as per prosecution story the charas was recovered from polythene packet which the appellant was carrying in his right hand. Therefore, recovery from the polythene packet which the appellant was carrying in his hand is nothing but recovery from the person of appellant. In support of her submission, she has relied **Baljeet Sharma** vs. **State of H.P.** Latest HLJ 2007 (HP) 707, wherein charas was recovered from the personal search of the accused kept in his hand wrapped in a newspaper and therefore, it was held that provision of Section 50 of the Act will apply to such a search. The learned counsel for the appellant has also relied **Dilip and another** vs. **State of M.P.** 2007 (1) SCC (Cri.) 377, wherein it has been held that the provision of

Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of the appellants was also searched, it was obligatory to comply with the said provision.

16. The learned Additional Advocate General has submitted that it is not a case of prior information and also of personal search. He has further submitted that the police party was on nakka duty at Ballu Pul Chowk Chamba because of frequent thefts in that area. The appellant came there. The police party was not having prior information that the appellant was carrying charas. Search was made in routine and during search, charas was recovered from the packet which the appellant was carrying. He has also submitted that it is not the case of the appellant during the trial that the police was having suspicion that appellant was carrying charas, therefore, he was searched. The learned Additional Advocate General has submitted that defence of Section 50 of the Act is after thought and it does not emerge from the trial. In support of his contention that Section 50 of the Act is not applicable in the present case learned Additional Advocate General has relied **State of Punjab** vs. **Balbir Singh** 1994 (3) SCC 299, where the Hon'ble Supreme Court in sub-para (1) of Para 25, has held as follows:-

> "(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of

complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

17. The Hon'ble Supreme Court in **Kalema Tumba** vs. **State of Maharashtra and another** AIR 2000 SC 402 in para-5 of the judgement, has held as follows:-

"Ms. M. Quamaruddin, learned counsel for the appellant, submitted that the mandatory requirement of Section 50 of the NDPS Act was not complied with and therefore the evidence regarding recovery and seizure of heroin should be regarded as illegal. She further submitted that the appellant could not have been convicted on the basis of that evidence. It was submitted by her that the appellant was not told, before the search by the officers of the Narcotic Control Bureau that he had a right to be searched in presence of a Gazetted Officer or a Magistrate. This contention deserves to be rejected because only when a person of an accused is to be searched then he is required to be informed about his right to be examined in presence of a Gazetted Officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. In State of Punjab v. Baldev Singh, (1999) 4 JT. (SC) 595 : 1999 AIR SCW 2494: AIR 1999 SC 2378: (1999 Cri LJ 3672), this Court has held that the requirement of informing the accused

about his right under Section 50 comes into existence only when person of the accused is to be searched….."

18. In **Durgo Bai and another** vs. **State of Punjab** AIR 2004 SC 4170 wherein after relying **Balbir Singh's** case in para-8, the Hon'ble Supreme Court has held as follows:-

"The next argument is that Section 50 has been violated inasmuch as search was done without adhering to the conditions laid down in the Section. This is again based on the premise that the police officials concerned must be presumed to have acted on the basis of definite prior information. Once this assumption is held to be wrong, the ratio of the decision in State of Punjab v. Balbir Singh [(1994) 3 SCC 299] gets attracted. The legal position has been clarified thus:

`…….But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Cr.P.C. comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done

> before the search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C. then the question of complying with Section 50 would not arise'."

The Hon'ble Supreme Court has further held that in that situation, Section 50 of the Act is not applicable.

19. In **State of Haryana** vs. **Ranbir alias Rana** AIR 2006 SC 1796, the Hon'ble Supreme Court has held that Section 50 of the Act is not applicable when contraband is found from a bag which was being carried by the accused. In **State of H.P.** vs. **Pawan Kumar,** (2005) 4 SCC 350, it has been held that a bag, briefcase or any such article or container etc. can under no circumstances be treated as body of a human being, they are given a separate name and are identifiable as such. They cannot even remotely be treated as part of body of human being. Depending upon the physical capacity of a person he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving alongwith them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

20. Now coming to the facts of the present case. The appellant while cross examining the prosecution witnesses, has not

projected the defence that nakka party was having prior information that the appellant was carrying charas rather in the cross examination of the witnesses the appellant has put forward a case of total denial to the extent that no recovery was made from him. The prosecution case is not of prior information, nor such case emerges from the evidence. Once the police party was not having prior information then Section 50 of the Act will not apply.

21. **Baljeet Sharma's** case (supra) has been decided on the facts of that case, wherein the question of inapplicability of Section 50 of the Act in view of absence of prior information was not before the Court. In **Dilip and another's** case (supra), a finding of fact was recorded by the learned Sessions Judge that there was likelihood of Sh. S.S.Tomar, Officer Incharge of Police Station, Kumbhraj having prior information about the matter. In that case, person of the appellant was searched in addition to the search of the scooter. In those circumstances, the Hon'ble Supreme Court has held that the provision of Section 50 might not have been required to be complied with in so far as the scooter is concerned, but keeping in view the fact that the person of the appellant was also searched, it was obligatory to comply with the said provision. Both the judgements relied by the learned counsel for the appellant are not applicable in the facts and circumstances of the present case wherein it has been proved on record that nakka party was not having any prior information before the recovery of charas from the appellant. The learned Special Judge has rightly appreciated the material on record. No case for interference has been made out.

22. No other point was urged.

23. The result of the above discussion, the appeal fails and is accordingly dismissed.

December 13, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**